129

(3)

No. 08-1247

In The
Supreme Court of the United States

STAR NORTHWEST, INC., a Washington corporation d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge,
Petitioner,

v.

CITY OF KENMORE, a Washington municipal corporation, and KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

PAUL J. DAYTON
Counsel of Record
LESLIE C. CLARK
SHORT CRESSMAN & BURGESS PLLC
999 THIRD AVENUE, SUITE 3000
SEATTLE, WA 98104
TELEPHONE: (206) 682-3333

Counsel for Petitioner

May 18, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

INTRODUCTION

Respondents' Brief in Opposition did not attempt to reconcile the decisions of the Washington Supreme Court in *Rhod-A-Zalea v. Snohomish County*, 136 Wash. 2d 1, 959 P.2d 1024 (1998), and *State v. Thomasson*, 61 Wash. 2d 425, 378 P.2d 441 (1963), (or similar decisions from other jurisdictions) and the Ninth Circuit panel's decision in this case. Respondents largely concede that the courts of Washington and other states have found a constitutional right to an amortization period on termination of a lawful nonconforming use. Instead, Respondents offered reasons why Kenmore Lanes[1] does not have the constitutional rights of other lawful businesses, including (1) Kenmore Lanes has no Fourteenth Amendment rights because the Washington State Gambling Act prohibits municipalities from granting an amortization period when banning card rooms; (2) a licensed card room has no Fourteenth Amendment rights because its business is vice-like. In this Reply, Kenmore Lanes will explain why these arguments did not persuade the Ninth Circuit and should not persuade this Court and respond on Respondents' newfound mootness claim.

REPLY TO RESPONDENTS' REASONS FOR DENYING PETITION

1. Respondents, for the first time, argue that Kenmore Lanes' claim is moot. Respondents reason

---

[1] Petitioner, Star Northwest, Inc., does business as Kenmore Lanes and the 11th Frame Restaurant & Lounge, and is referred to herein as "Kenmore Lanes."

that some amortization periods are one year or less; therefore, the three years that Kenmore Lanes has operated during this litigation cured the deficiency in their Ordinance. Respondents, not for the first time, have failed to take account of the consequences of their action. Operating under a temporary restraining order, preliminary injunction and stay on appeal is much different than a delayed effective date in an ordinance. The publicity surrounding the City's ban and the uncertainty about when and whether it would be forced to close has substantially reduced Kenmore Lanes' patronage, resulting revenue and profitability. In short, temporary injunctive relief during litigation is not the same as a provision in an ordinance allowing operation for a specified period.

As well, Respondents have gotten ahead of the process because the necessary amortization period has not been determined.[2] Respondents' own cases indicate that calculation of an appropriate amortization period requires a balancing of factors. *See Northend Cinema v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1159-60 (1978), and *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1199 (9th Cir. 2004). The evidence Kenmore Lanes

---

[2] Respondents suggest that Kenmore Lanes sought only a one-year amortization period. Brief in Opposition at 18. That is incorrect, as Kenmore Lanes' complaint attacked the validity of the Ordinance and did not request a specific amortization period. It has proffered evidence that a one-year amortization period was removed from the proposed ordinance in support of its challenge to the Ordinance. But, its criticism of the City Council's decision to remove a one-year amortization period from the proposed ordinance is not equivalent to agreeing to the term provided for in the proposed ordinance.

submitted in the district court showed that recovery of the value of its investment, $4,936,000, would take more than five years, much more than the period of operation during litigation.

Respondents suggest that regardless of its constitutional right to an amortization period, Kenmore Lanes' card room license would have expired more than two years ago. This is incorrect. Kenmore Lanes' license has been renewed annually, just as it has been renewed annually as long as Kenmore Lanes has owned it and since the card room commenced operation in 1974. More fundamentally, the property right in question is the right to operate a business, not merely the license. *See Lee & Eastes v. Pub. Serv. Comm'n,* 52 Wash. 2d 701, 328 P.2d 700, 702 (1958). That business has no expiration date, and the constitutional claim that derives from its termination is not moot. *Cf. Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 239 (1985) (business' challenge to the revocation of its liquor license became moot when the business closed because "no decision on the merits by this Court can now have an effect on" the disputed license).

The remainder of Respondents' Brief in Opposition defended the Ninth Circuit panel's analysis of federal law and urged state law reasons why Kenmore Lanes lacks a federal constitutional right. As neither of these approaches elucidates or eliminates the clash between the Washington Supreme Court's decisions and the Ninth Circuit panel's decision in this case, they do not aid the Court in judging this Petition. The remainder of the Reply offers brief rebuttal of Respondents' points.

2. Respondents claim that the Washington State Gambling Act of 1973, Revised Code of Washington (RCW) chapter 9.46, bars municipalities from granting a card room an amortization period overriding the constitutional amortization right described in *Rhod-A-Zalea v. Snohomish County*. Neither of the City's cases, *Edmonds Shopping Center v. City of Edmonds*, 117 Wash. App. 344, 71 P.3d 233 (2003), and *Paradise, Inc. v. Pierce County*, 124 Wash. App. 759, 102 P.3d 173 (2004), even analyzed the constitutional right to an amortization period. Indeed, in *Edmonds*, the Court of Appeals recognized what Respondents now dispute—that *Rhod-A-Zalea* requires that constitutional limits apply to city police power actions even when police power actions target card rooms. *Edmonds*, 71 P. 3d at 240 n.33. Thus, they give Respondents no help on the application of *Rhod-A-Zalea* and *Thomasson*.[3] These cases were not mentioned in the Ninth Circuit's analysis of the Kenmore Lanes' substantive due process claim, and they offer no guidance to this Court either.

Respondents also suggest that this case concerns solely interpretation of a provision of the Washington State Gambling Act. Respondents do not explain how such a statute could overcome a federal constitutional right. *See* U.S. Constitution Article VI, Clause 2 (Supremacy Clause); *New York v. United States*, 505

---

[3] In *Edmonds*, the plaintiff made no claim that it had a constitutional right to an amortization period, choosing to challenge only the ban itself. 71 P.3d at 242. In *Paradise*, the ordinance provided for a three year amortization period and the plaintiff did not challenge the sufficiency of that period, so the constitutional right to an amortization period was not in question. 102 P.3d at 176.

U.S. 144, 159 (1992). Nor do Respondents cite any case suggesting that the Washington State Gambling Act curtails a business owner's constitutional right to an amortization period on termination of a legal nonconforming use. Any such argument would be unavailing because the Act does not purport to prescribe the conditions under which card rooms may be banned.[4] Indeed, in *Paradise*, proffered by Respondents, the subject ban on card rooms deferred the effective date *for existing card rooms* for three years, effectively providing an amortization period. 102 P.3d at 176. The City Attorney for Respondents' suggested a similar delayed effective date when the Kenmore ordinance was presented for vote, but the City of Kenmore ignored his advice.

3. *Rhod-A-Zalea* states constitutional limits for termination of nonconforming uses, but Respondents suggest that the Washington Supreme Court's analysis of constitutional requirements is "dicta" because it was not necessary to the decision in that case. This unfairly minimizes the Washington Supreme Court's explication of the law. Presented with Rhod-A-Zalea's argument that a legal nonconforming use was not subject to subsequent police power regulations, the Washington Supreme Court surveyed the jurisprudence of this Court and many cases from other states and described the constitutional

---

[4] The Act sets up a system of licensing and regulation under the authority of the State Gambling Commission. RCW 9.46.295, the provision relied on by Respondents, is entitled "Licenses, Scope of Authority—Exception." It provides that a state-issued license is authority to engage in gambling activities, but allows cities and counties to prohibit "any or all of the gambling activities for which the license was issued."

limitations on termination of a legal nonconforming use. 959 P.2d at 1027-29. That analysis of constitutional limits on regulation of legal nonconforming uses was necessary to its holding in the case and is not dicta. *See Grundy v. Thurston County*, 155 Wash. 2d 1, 117 P.3d 1089, 1093 (2005) (rejecting as dicta statements about seawater in a decision addressing river overflows because "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed") (citation omitted).[5] *See also City of West Richland v. Dep't of Ecology*, 124 Wash. App. 683, 103 P.3d 818, 822 (2004) (an analysis distinguishing distinct but related concepts was not dicta). Notably, Respondents did not label as dicta the Washington Supreme Court's similar statements in *Thomasson,* 378 P.2d at 443-44 (invalidating the conviction of a wrecking yard operator on the ground that termination of an existing nonconforming use is unconstitutional insofar as "it deprives individuals of vested rights without due process of law"). *See also State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 242 P.2d 505 (1952).

4. In briefing before the Ninth Circuit, Respondents argued that Kenmore Lanes lacked a Fourteenth Amendment right because its business is "vice-like." The Ninth Circuit panel was not persuaded, and its

---

[5] The Ninth Circuit similarly takes a narrower view of what constitutes dicta than urged by Respondents. *See, e.g., United States v. Ingham*, 486 F.3d 1068, 1079 n.8 (9th Cir. 2007) (a "careful three-page treatment" of a subject was not dicta because it was not "made casually and without analysis, . . . uttered in passing without due consideration of the alternatives . . . ") (citation omitted) (alteration in original).

original Memorandum decision explicitly assumed that Kenmore Lanes had the requisite constitutional right supporting a substantive due process claim. This is because labels like "vice-like" do not impair Kenmore Lanes' constitutional right to an amortization period. The City anchored its argument here in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), a First Amendment case that applied a constitutional test for restrictions on commercial speech and confirmed that restrictions on gambling-related speech met *Central Hudson*'s[6] constitutional requirements.[7] The case did not take up the constitutional rights of legal businesses engaged in a nonconforming use and does not apply here. While gambling – like many things – can be banned, once established, the gambling business becomes a use, and the owner gains the right to an amortization period when the use is terminated. *Thomasson*, 378 P.2d at 443-44.[8] When the *Edge*

---

[6] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[7] The Court has since modified its view of the social acceptance of gambling. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), the Court noted that Congress has taken action to promote gambling and whatever the policy in earlier years, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." 527 U.S. at 187.

[8] Even highly-regulated uses, such as gambling and liquor sales, cannot be summarily terminated without a factual inquiry into the use's impacts. *See, e.g., AVR, Inc. v. City of St. Louis Park*, 585 N.W.2d 411 (Minn. App. 1998) (City did not violate equal protection rights when it amortized a nonconforming ready-mix concrete plant but allowed a nonconforming liquor bar to operate indefinitely because, after a factual inquiry, the concrete plant created significant negative impacts, and the liquor bar did not).

Broadcasting Court declared that gambling had no constitutional protection, it referred to the government's right to prospectively ban it, and did not address a municipality's obligation to provide an amortization period when banning an established gambling business.[9]

The Court's treatment of gambling-related advertising in *Edge Broadcasting* has since been clarified in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996). In that case, a four-member plurality of the Supreme Court rejected the analysis in *Posadas*, relied upon by *Edge Broadcasting*, and explicitly stated that there is no vice exception that justifies violation of constitutional rights, especially when the activity is authorized by statute. *Liquormart*, 517 U.S. at 513-14 ("Almost any project that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market"). *See also Ruben v. Coors Brewing Co.*, 514 U.S. 476, 478, 482 n.2 (1995).

Furthermore, the City's reliance on First Amendment case law does not answer the Washington cases identifying business owners' property rights which are weighed against the City's exercise of its police power. Whether the facility in question is a bar, a cement plant, a wrecking yard, or a card room, if it

---

[9] *See Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

is an existing legal use, the owner has a property right that must be balanced against the City's exercise of its police power. Labels like "vice-like" or "nuisance-like" are not found in the case law on termination of nonconforming uses — in Washington or elsewhere. Instead, the City may find exception to the amortization requirement only if it proves a nuisance. That, it has not attempted.

5. Respondents' defense of the Ninth Circuit's substantive due process analysis did not take up the conflict between it and the decisions of the Washington Supreme Court. Respondents begin this analysis by looking back to the district court's conclusion that the Fifth Amendment subsumes a substantive due process claim, citing *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996). But, as Kenmore Lanes explained in its Petition, post-*Lingle v Chevron USA, Inc.,* 544 U.S. 528 (2005), the Ninth Circuit has rejected this rule. *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 855-57 (9th Cir. 2007), and the Ninth Circuit did not apply it in this case. Persisting with this theme, Respondents suggest that Kenmore Lanes' claim really sounds in takings because "no amount of compensation can authorize" a substantive due process violation. Brief in Opposition at 21 (citing *Lingle,* 544 U.S. at 534-44). This argument misunderstands the purpose and effect of an amortization period. Profits from one, two, three, or even five years of operation would not compensate Kenmore Lanes for the loss of a business valued at almost five million dollars. Amortization periods enabling transition and mitigation of injury rationalize municipal action to terminate a legal nonconforming use that is otherwise arbitrary.

Respondents also revisit and invoke Washington Administrative Code (WAC) 230-04-175, the repealed Gambling Commission regulation on "vesting." The Ninth Circuit panel relied on this provision in its initial Memorandum decision, but, on Kenmore Lanes' petition for rehearing, deleted that part of its Memorandum in favor of the substantive due process analysis that is the subject of this Petition. Respondents maintain that the panel's substituted substantive due process analysis comports with *Lingle* and Ninth Circuit precedent, but this endorsement of the panel's analysis does not answer the point of Kenmore Lanes' Petition—that the Ninth Circuit panel's decision directly conflicts with the Washington Supreme Court's decisions requiring an amortization period on termination of a lawful nonconforming use. Resolution of that split awaits this Court's review.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

PAUL J. DAYTON
LESLIE C. CLARK
Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
Telephone: (206) 682-3333
Counsel for Petitioner